Supreme Court, U.S.
FILED

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No.

IN THE
Supreme Court of the United States

DON PRINCE,
Petitioner,

v.

UNITED STATES,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in failing to grant relief on collateral review for abridgement of petitioner's right to jury trial.

2. Whether the Court of Appeals erred in finding that Don Prince may not litigate on collateral review the issue of whether his trial lawyer rendered constitutionally ineffective assistance of counsel by failing to object to the trial court's erroneous instruction as to the jury's power.

3. Whether the Court of Appeals erred in failing to require the district judge to conduct an evidentiary hearing on Don Prince's 28 U.S.C. § 2255 motion.

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Secondary Authority

Wayne R. LaFave, et al, Criminal Procedure (3d ed. 2000) 6,7

OPINIONS BELOW

1. *U.S. v. Prince*, 37 Fed.Appx. 649, 2002 WL 1331997 (4th Cir. June 18, 2002), *petition for rehearing en banc denied,* Oct. 21, 2002. (Reprinted in the appendix. App. at 1a-3a.)
2. *U.S. v. Prince*, CR-96-122, CA-01-2047-3-17 (D.S.C. Dec. 5, 2001). (Reprinted in the appendix. App. at 4a.)
3. *U.S. v. Prince*, 187 F.3d 632 (4th Cir. 1999), *cert. denied, Prince v. U.S.*, 529 U.S. 1086 (1999). (Reprinted in the appendix. App. at 16a.)

JURISDICTIONAL STATEMENT

On Dec. 5, 2001, Petitioner Don Prince was denied post-conviction relief under 28 U.S.C. § 2255 by the United States District Court in the District of South Carolina, subsequent to his conviction in that same court. On June 18, 2002, the Fourth Circuit Court of Appeals affirmed the denial of post-conviction relief, declining to grant a certificate of appealability, and that same Court, on October 21, 2002, denied petitioner's timely motion for rehearing and hearing *en banc.* All opinions in petitioner's case are unpublished and reproduced in the appendix to this petition. Jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS AND STATUTES

This petition involves the 6th Amendment to the Constitution of the United States, which provides in pertinent parts that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed . . . and to have the Assistance of Counsel for his defense." It also involves 28 U.S.C. § 2255 and 18 U.S.C. § 371, reproduced in the appendix to this petition. App. at 41a-43a.

STATEMENT OF THE CASE

In a jury trial held during July, 1996, Petitioner Don Prince and his brother, Bill Prince, were convicted in the District of South Carolina under 18 U.S.C.§ 371 for conspiracy to murder. App. at 5a.

At the time of the trial, Petitioner Don Prince was 55 years old and a successful businessman. He had attended Campbell College on an athletic scholarship and played professional baseball for seven years with the Chicago Cubs. He had two adult children from a prior marriage.

In 1992, Bill Prince had been convicted in a South Carolina state court of conspiracy and solicitation of murder. App. at 18a. Late in 1995, Don Prince was working heavily with several attorneys on motions for a new trial and post conviction relief for his brother. App. at 18a. Part of the strategy for this effort was to attempt to obtain affidavits supporting Bill's innocence from individuals who had previously testified against Bill in his 1992 trial, as well as from other witnesses. App. at 19a. During this time, Don was also regularly sending money to his brother, Bill, and also to friends that Bill asked him to provide with money. App. at 20a.

Beginning in late summer of 1995, Don Prince had been attempting to get statements signed by "Peaches" Andrews and Charlie Dorn Smith. App. at 19a. Smith had been Bill Prince's co-defendant and Andrews the key prosecution witness against Bill Prince. App. at 18a. From prison, Bill told Don that he had a friend, a former inmate in state prison, who could get the signatures of Andrews and Smith to their respective affidavits. App. at 19a. Unbeknownst to the Prince brothers, however, Bill's "friend", Mr. Scott Sherpinskas, was a an inmate informant. App. at 19a.

On December 14, 1995, Don visited his brother Bill in prison, who requested him to meet a man at a rest area and give him $5,000. App. at 7a. Don put $2,500 in two separate

envelopes and went to the rest area. App. at 21a. He later testified (and still maintains) that the money was for the purpose of obtaining affidavits to help secure a new trial for his brother. App. at 8a. He then gave the envelopes to the man, who was undercover FBI agent Bruce Otterbacher. App. at 21a. Shortly after this exchange, Don was arrested that day for conspiring with his brother Bill to murder "Peaches" Andrews and Charles Dorn Smith. App. at 8a. The two brothers were the only persons involved in the alleged conspiracy who were not government agents or informants. App. at 13a.

In July of 1996 Don stood trial jointly with Bill for the alleged conspiracy. App. at 9a. At trial, Don testified that he never knew of any murder plot and that he believed he was paying the FBI agent for affidavits, not murders. App. at 32a. Bill did not testify. App. at 10a.

The evidence against Bill for conspiracy to murder was considerably stronger than the evidence against Don.[1] Moreover, Bill Prince volunteered to testify in a severed trial that Petitioner Don Prince had no knowledge of any murder plot and thought that the money he was providing was intended to facilitate the process of obtaining affidavits. App. at 10a. Severance of the trial was raised with the court on and off by Don Prince's attorney, Jack Swerling, in the form of a "continuing motion" App. at 35a. However, Jack Swerling did not make a formal proffer of Bill Prince's testimony and did not insist that the judge rule on the motion to sever on the basis of Bill Prince's proffered testimony. *See* App. at 36a.

After initially being instructed by the judge and

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[1]For example, as opposed to several recordings of Bill Prince's conversations with the government informants, the various recordings of Don Prince were ambiguous at best as to his knowledge of a murder plot. *See* App. at 32a-33a (the trial court noting that the parties on tape used guarded language and code words, without specific references to either murder or collection of affidavits).

commencing its deliberation, the jury trying the case asked the judge whether it could convict only one of the Prince brothers on the conspiracy charge. The judge, after consulting with counsel, responded in the negative. App. at 36a. Don Prince's counsel, Jack Swerling, failed to object to the instruction. App. at 36a. The jury then returned with a verdict convicting both brothers. App. at 17a.

Jack Swerling also represented Don Prince on direct appeal. App. at 17. On direct appeal, Swerling failed to argue plain error under Rule 52(b) in his initial brief before the Fourth Circuit on this issue, App. at 16a; and as a result, Petitioner Don Prince was procedurally barred from raising the issue. *United States v. McCaskill*, 676 F.2d 995, 1001-1002 (4th Cir. 1982). Accordingly, the Fourth Circuit's *per curiam* opinion on direct appeal does not discuss it. App. at 17a-34a.

Jack Swerling then filed a Petition for Writ of Certiorari on behalf of Petitioner, which was denied on April 4, 2002. *Prince v. U.S.*, 529 U.S. 1086 (1999). New counsel then moved for post-conviction relief under 28 U.S.C.§ 2255, but the trial court denied this motion for relief on Dec. 4, 2001. App. at 4a-15a. The Court of Appeals refused to grant a certificate of appealability on June 8, 2002, and later declined to hear the appeal *en banc*. App. at 1a-3a.

ARGUMENT

I. THE COURT OF APPEALS ERRED IN FAILING TO GRANT RELIEF ON COLLATERAL REVIEW FOR ABRIDGEMENT OF PETITIONER'S RIGHT TO JURY TRIAL.

Petitioner Don Prince contends that his right to a jury trial was denied by the erroneous answer by the trial judge to a very crucial question posed by the jury in the middle of its deliberations. In that question, the jurors asked the judge whether or not they were allowed to render a verdict convicting

only one of the defendants for conspiracy to commit murder. The judge answered in the negative, and thereafter the jury returned a verdict convicting both petitioner and his brother.

Unlike several states, the United States Congress has chosen to follow a bilateral theory of conspiracy. 18 U.S.C. § 371. By contrast, the Model Penal Code, §5.03, recommends a unilateral theory for this offense. Therefore guilt of the offense in the federal courts requires that there be at least two persons who share in the criminal purpose and join in the agreement. In order to meet this requirement, the two persons must actually share this purpose and not merely purport to share it. Accordingly if two individuals purport to agree but one of those individuals is an undercover agent or for some other reason does not wish to accomplish the illegal objective, a criminal conspiracy does not exist for purposes of a federal prosecution. *See, e.g., Sears v. U.S.*, 343 F2d. 139 (5th Cir. 1965).

In one respect, therefore, the answer the trial judge gave to the jury's question, was correct. Since the alleged conspiracy involved three persons, of whom one was an undercover agent, the only two possible conspirators were the two Prince brothers, who were being tried together. Thus as a matter of logical consistency according to the bilateral conspiracy approach, either both brothers had conspired or neither had conspired in violation of 18 U.S.C. § 371.

The power granted juries, however, is not limited by requirements of consistency. It is well established that a jury may render a verdict that is inconsistent as to the separate counts, *Dunn v. United States*, 284 U.S. 390 (1932), or inconsistent as to joint defendants, *United States v.*

Dotterweich, 320 U.S. 277 (1943).[2] Indeed, inconsistency has even been tolerated in a trial judge's verdict. *Harris v. Rivera,* 454 U.S. 339 (1981).[3]

Admittedly, a jury possesses powers as to which the judge may have no obligation to inform it. One example is with respect to jury nullification. *See, e.g., United States v. Dougherty,* 473 F.2d 1113 (D.C. Cir. 1972); *cf. United States v. Thomas,* 116 F.3d 606 (2d Cir. 1997).[4] However, undersigned counsel is not aware of any case in which a jury explicitly returned to the trial judge and asked him whether it possessed the power to nullify. Petitioner contends that if such a case did arise, a judge would have the obligation to answer in the affirmative, under the judge's general duty to accurately instruct the jury as to the applicable law in the case. *See, e.g., Spangler v. U.S.*, 487 U.S. 1224 (1988)(White, J., dissenting) (noting that "[s]ome courts have held that such an instruction is never necessary and often, if not always, is improper because it actually misleads the jury"); *Darden v. Wainwright*, 477 U.S. 168, 183 (1986)(distinguishing *Caldwell v. Mississippi*, 472 U.S. 320 (1985), on the basis that it "is relevant only to certain

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[2]"Whether the jury's verdict was the result of carelessness or compromise or a belief that the responsible individual should suffer the penalty instead of merely increasing, as it were, the cost of running the business of the corporation, is immaterial. Juries may indulge in precisely such motives or vagaries." *Dotterweich,* 320 U.S. at 279.

[3]"In this case, if the judge was convinced beyond a reasonable doubt that respondent and his wife were both guilty, it would be most unfortunate if a concern about the plausibility of a lingering doubt about Robinson should cause him to decide to convict all three rather than to try to articulate the basis for his doubt." *Harris v. Rivera,* 454 U.S. at 347.

[4]Even with respect to nullification, arguments have been presented that the jury should be advised of its power. *See* Wayne R. LaFave et al, Criminal Procedure § 22.1(g), at 1028 (3d ed. 2000).

types of comments--those that mislead the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the sentencing decision").

In the case at hand, however, the jury's question was not whether it had the power to nullify the law, but instead whether, *under the law*, it had the power to render an inconsistent verdict. Here the jury on its own initiative was seeking advice as to the scope of its powers. Whether or not the defendant was entitled to an initial instruction as to inconsistency, the defendant was at least entitled to a jury which was not misled by the trial judge on the subject.

Petitioner and his counsel are unaware of any case dealing directly with this issue in this context. Petitioner accordingly requests the Court to make a definitive statement in this area.

One possible analogy does exist to this situation. In *Foretta v. California*, the Court held that a defendant is entitled to represent himself, and a court who advised a defendant to the contrary would commit constitutional error. 422 U.S. 806 (1965). On the other hand, there is no duty to advise the defendant of that right. "Lower courts have uniformly assumed that there is no constitutional obligation to inform the defendant of his constitutional right to proceed *pro se* in the absence of a clear indication on his part that he desires to consider that option." Wayne R. Lafave, et. al., Criminal Procedure § 11.5(b), at 588 (3d Ed. 2000).

If a trial judge is allowed to mislead the jurors as to their own powers, either deliberately or from ignorance, the fundamental constitutional right of criminal defendants to a jury trial is seriously threatened. Petitioner also submits that the judge's misstatement of law to the jurors in his case was serious and significant. Indeed, petitioner was especially prejudiced because, according to all the evidence, his role in the alleged conspiracy had only been subordinate to and supportive of his

brother's role. Therefore, if only one of the two Prince brothers was to be acquitted, petitioner Don Prince was to be that one.[5]

Accordingly, petitioner maintains that his right to a full and fair jury trial was prejudiced because the jury was improperly constrained by the trial judge who answered the jury's question erroneously. The judge should have properly advised the jurors of the scope of their powers but reiterated to them that the conspiracy statute requires that there be two persons who are in genuine agreement as to their purpose.

This Court has recently reiterated the importance of the 6th Amendment right to trial by jury in *Apprendi v. New Jersey*, 530 U.S 466 (2001) and later in *Ring v. Arizona*, ____U.S.____,122 S.Ct. 2428 (2002). In so doing, it has followed in the spirit of its earlier observation after its extended discussion of the constitutional history and purpose of the jury in *Duncan v. Louisiana*:

> "The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered...If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it."
>
> 391 U.S. 145, 155-156 (1968).

To the best of the undersigned counsel's knowledge, this case is one of first impression on this issue. As such it provides an occasion for this Court to once again reemphasize the historic independent role of the jury in the American

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[5]This was so obvious from the testimony at trial that only Don Prince's attorney was called up to speak with the trial judge when he was considering his answer to the jurors. App. at 36-38.

criminal justice system.

II. THE COURT OF APPEALS ERRED IN FINDING THAT DON PRINCE MAY NOT LITIGATE ON COLLATERAL REVIEW THE ISSUE OF WHETHER HIS TRIAL LAWYER RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO OBJECT TO THE TRIAL COURT'S ERRONEOUS INSTRUCTION AS TO THE JURY'S POWER.

Don Prince's trial counsel, Jack Swerling, also represented him on direct appeal. App. at 17a. It is understandable that Swerling would not present on direct appeal his failure to object to the trial judge's erroneous instruction to the jury about its power and to point out that this was an error of constitutional magnitude, entitling his client to a new trial. Under the circumstances that existed and in light of the evidence that had been presented, it was almost inevitable that if only one of the two defendants was acquitted, it would be the petitioner, Don Prince. And obviously the jury was thinking seriously of acquitting one of the two defendants or else it would have never posed to the court a question about its right to do so. Nevertheless, petitioner's counsel had decided to surrender his client's chance for acquittal and allow him to be dragged down by the evidence against his co-defendant. He did not object to the instruction, and he did not press for a ruling from the court on a motion for severance. *See* App. at 35-38. Then on direct appeal, the same attorney compounded his earlier error by failing to properly bring the issue before the appellate court, which accordingly did not bother to discuss it. *See* App. at 39-40. These questions of effective assistance of counsel are properly advanced on collateral review, as petitioner seeks to do.

The district court below, however, took the position that petitioner Don Prince's 28 U.S.C. § 2255 motion must be

rejected with respect to the inconsistent verdict issue on the grounds that it was "[a]n attempt to resurrect an issue already decided on appeal under the guise of collateral review." App. at 13a. However, in this case the same counsel had failed to properly argue the issue on appeal as well as failed to object and preserve the issue at trial. And the fact that this issue was not even mentioned in the otherwise thorough opinion of the appellate court makes it problematic to maintain, as the district court did, that it was decided on appeal. Accordingly, the rationale of the district court is not supported by the record in this case.

Petitioner submits such circumstances demonstrate why collateral review is part of our justice system and is a proper subject of an ineffective assistance of counsel claim. Moreover, the error in question is much more than a mere instructional error, but instead it is a fundamental flaw which affected a fundamental right and had a direct impact on the outcome of the case.

III. THE COURT OF APPEALS ERRED IN FAILING TO REQUIRE THE DISTRICT JUDGE TO CONDUCT AN EVIDENTIARY HEARING ON PETITIONER'S 28 U.S.C.§ 2255 MOTION.

In his 28 U.S.C. § 2255, motion, petitioner Don Prince also alleged that his counsel was ineffective by failing to effectively move for a severance of the trial based on his co-defendant's proffered testimony. App. at 9a-10a. The court below rejected this argument on the grounds that Don Prince "failed to show that the nature and effect of such testimony would be to exculpate him." App. at 10a. In so doing, the district court points to the potential credibility problems that Bill Prince would have as a witness. App. at 10a-11a. However, this rationale substitutes the judge's assessment of the *credibility* of the testimony for the nature and effect, i.e., the

meaning of the testimony. In so doing, it perverts the test laid out by the Fourth Circuit in *United States v. Reavis*, 48 F.3d 763,767 (4th Cir. 1995)

Furthermore, in considering that aspect of Don Prince's motion in the context of ineffective assistance of counsel, the court had before it sharply conflicting affidavits from Jack Swerling, counsel for Don Prince and Jack Lawson, who represented Bill Prince. App. at 39a-40a. Additionally, Mr. Swerling's affidavit accuses Don Prince of untruthfulness as to whether or not Mr. Swerling refused to call Bill Prince as a witness, App. at 40a, is internally inconsistent, and contradicts the transcript record when it claims that the failure to request severance on the grounds of Bill Prince's proffered testimony was a strategic choice. *Cf.* App. at 36a; App. at 39a. An evidentiary hearing by the trial judge was required under these circumstances, to sort out these conflicting facts. As the Court has said on a prior occasion:

> On this record we cannot conclude with the assurance required by the statutory standard "conclusively show" that under no circumstances could the petitioner establish facts warranting relief under § 2255; accordingly, we vacate the judgment of the Court of Appeals and remand to that court to the end that the petitioner be afforded a hearing on his petition in the District Court.

Fontaine v. United States, 411 U.S. 213, 215 (1973):

For whatever reason, there seemed to be a hesitancy on the part of Don Prince's trial counsel to seek an acquittal for Don Prince, that might be at the expense of Don's brother and co-defendant, Bill Prince. Petitioner's trial counsel failed to effectively press for a severance of the trial when he could have

forcefully done so by making a formal proffer of Bill Prince's exculpatory testimony and insisting that the trial judge make an up or down ruling on his motion. Instead of making such a formal proffer, Mr. Swerling talked about it and around it and then let the entire matter drop as soon as the judge changed the subject. App. at 36a. Then, in his affidavit which he gave to the government counsel for use in defense against Don Prince's motion for 28 U.S.C. § 2255 relief, Mr. Swerling seems to take mutually contradictory positions. On one hand, Don Prince was lying that he didn't offer the testimony of Bill Prince, and on the other hand, Bill Prince's testimony, if presented, would have been disastrous.[6] Only now, on collateral review, is it possible for the conflicting facts to be sorted out as to whether Don Prince was provided ineffective assistance of counsel in this regard under the standards of *Strickland v. Washington*, 466 U.S. 668 (1984).

Don Prince was entitled to be represented competently in his trial and direct appeal. Without a full evidentiary hearing being conducted by the trial court, it will not be possible to determine, and ultimately review, whether petitioner received that constitutionally mandated representation. This Court remains sensitive to the nuances of effective assistance of counsel, in its most recent treatment of these issues, and indeed such issues are before the Court in its present term. *See, e.g., Wiggins v. Warden Corcoran, et al.*, (No. 02-311), *cert. granted*, ___ U.S.___, 123 S.Ct. 556 (2002); *Massaro v. United States* (No. 01-1559), *cert. granted*, ___U.S.___, 123 S.Ct. 31 (2002).

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[6]Mr. Swerling's affidavit states "(t)he Petitioner has misrepresented many facts to the Court and with regard to several matters he is at best simply not telling the truth, e.g., I refused to call his brother as a witness. The Petitioner knew and still knows that calling Bill Prince would have been a disaster." App. at 40a.

When the Court recently denied certiorari on June 3, 2002 in the celebrated "sleeping counsel" case, *Berdine v. Johnson,* 262 F3d. 336 (5th Cir. 2001), *cert. denied,* ___ U.S. _____, 122 S.Ct. 2347 (2002), the Fifth Circuit's statement in that opinion below became even more relevant to Don Prince's circumstance:

> In this regard, the State asked more of Berdine than the Supreme Court or this Court has ever asked of a defendant attempting to show the absence of counsel during a critical stage of the trial. To justify a particular stage as "critical" the Court has not required the defendant to explain how having counsel would have altered the outcome of his specific case. Rather the court has looked to whether "the substantial rights of a defendant may be affected" during that type of proceeding. (*citations omitted*)
>
> 262 F.3d 336 at 347.

Though he did not sleep at trial, petitioner's trial counsel was inattentive to the strategic choices required of him. His conduct in the trial in effect supported the efforts of the court to force the jury to acquit both defendants or convict both defendants.

The practical result of this position, under the factual circumstances of this case, was to direct the jury to convict the petitioner, if the jury convicted his co-defendant. At a minimum, there is a significant factual dispute as to whether or not his performance met the *Strickland* standard for effectiveness. Thus, at the least, an evidentiary hearing should

be conducted by the trial judge.[7]

CONCLUSION:

For the above stated reasons, this Court should grant appellant Don Prince's petition for a writ of *certiorari* and either direct that he be granted a new trial due to the deprivation of his Sixth Amendment right to jury trial that petitioner has suffered, or in the alternative, to remand the case to the United States Court of Appeals for the Fourth Circuit, with direction that the district judge conduct an evidentiary hearing on the disputed factual issues raised in petitioner's motion under 28 U.S.C. § 2255.

Respectfully submitted this 21st day of January, 2003.

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[7]In the context of such a hearing petitioner submits that the polygraph evidence that he proffered should be considered in order to obtain a more complete picture of what had occurred.

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
October 21, 2002

No. 02-6221
CR-96-122
CA-01-2047-3-17

UNITED STATES OF AMERICA
Plaintiff-Appellee
v.
DON PRINCE
Defendant-Appellant

On Petition for Rehearing and Rehearing En Banc

The appellant's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

For the Court,

/s/ Patricia S. Connor

CLERK

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 02-6221

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

DON PRINCE,

Defendant-Appellant.

Appeal from the United States District Court for the District of South Carolina, at Columbia. Joseph F. Anderson, Jr., Chief District Judge. (CR-96-122, CA-01-2047-3-17)

Submitted: June 13, 2002 Decided: June 18, 2002

Before WIDENER, LUTTIG, and WILLIAMS, Circuit Judges.

Dismissed by unpublished per curiam opinion.

Vonno Lamar Gudger, III, Asheville, North Carolina, for Appellant. Mark C. Moore, Assistant United States Attorney, Columbia, South Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIAM:

Don Prince seeks to appeal the district court's order denying his motion filed under 28 U.S.C.A. § 2255 (West Supp. 2001). We have reviewed the record and the district court's opinion and find no reversible error. Further, Prince's claims raised for the first time on appeal are not cognizable because he has shown no exceptional circumstances. Muth v. United States, 1 F.3d 246, 250 (1993). Accordingly, we deny Prince's motion for a certificate of appealability and dismiss the appeal on the reasoning of the district court. See United States v. Prince, Nos. CR-96-122; CA-01-2047-3-17 (D.S.C. Dec. 5, 2001). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

DISMISSED

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Don Prince,	)	C/A No.: 3:01-2047-17
	)	CR No.: 3:06-122
Petitioner	)	
	)	
	)	
v.	)	**ORDER**
	)	
United States of America,	)	
	)	
Respondent.	)	
	)	

The petitioner, Don Prince, initiated this action pursuant to 28 U.S.C. § 2255 to vacate, set aside or correct his sentence. This represents petitioner's third post-verdict attempt to challenge his conviction for murder-for-hire. Several of the issues raised in the instant petition have already been raised on direct appeal and rejected by the United States Court of Appeals for the Fourth Circuit. As to the remaining claims, the court finds no genuine issue of material fact and agrees with the government that summary judgment is appropriate.

PROCEDURAL HISTORY

In 1996, a four-count indictment was filed charging brothers Roger Prince ("Bill") and Don Prince ("Don") with violations of 18 U.S.C. § 1958(a), the murder-for hire statute. Counts 1 and 2 charged Bill and Don with conspiracy to travel and cause someone else to travel in interstate commerce with

intent to murder Frederick "Peaches" Andrews ("Andrews") and Charlie Dorn Smith ("Smith"), respectively, in exchange for money. Count 3 charged that Don traveled in interstate commerce from North Carolina to South Carolina on December 14, 1995, with intent that the murder of Andrews be committed for $5,000. Count 4 alleged that Bill caused another to travel in interstate commerce with the intent that a murder be committed for the payment of $5,000.

Both defendants were tried before a jury in July, 1996. The jury found both defendants guilty on all counts. Don was thereafter sentenced to 120 months incarceration on Count 1; 91 months on Count 2 (these two sentences to run consecutively); and 91 months on Count 3 (to run concurrently). Don previously took an unsuccessful appeal to the Fourth Circuit Court of Appeals, where he raised numerous alleged errors at his trial. The Fourth Circuit affirmed the sentence and conviction, observing that the evidence against Don was overwhelming. Don thereafter unsuccessfully sought certiorari from the United States Supreme Court.

Don subsequently filed a motion for a new trial which was denied by this court.

FACTUAL HISTORY

In 1992, Bill Prince was convicted in South Carolina state court for conspiracy and solicitation in the murder of Bill's foster father, Billy Graham ("Graham"). Bill and Smith hired a man to kill Graham because they owed Graham money, and because Bill had a life insurance policy on Graham. Andrews testified against Bill in the Graham murder trial. Smith and Andrews were the two proposed victims in the murder-for-hire convictions of Bill and Don that form the basis of Don's instant petition.

Bill remained free on bond during the pendency of his

appeal of his conviction of Graham's murder and became a fugitive when his appeal was rejected. Bill remained a fugitive from 1994 until 1995. During this time, Don helped Bill evade law enforcement, ran Bill's business, and arranged medical appointments. When Don's ex-girlfriend learned of Graham's murder and Don's efforts to keep Bill out of jail, Don threatened her to "keep her quiet."

After Bill's arrest, Don traveled from North Carolina to South Carolina to visit Bill in prison. He also attempted to secure affidavits in an effort to obtain a new trial for Bill. For a year, the brothers tried to get an affidavit from Andrews, who had testified against Bill in the Graham murder trial. Don and Bill then hatched a plot to kill Andrews and Smith.

In the fall of 1995, Scott Sherpinskas ("Sherpinskas"), an FBI informant who was an inmate with Bill, contacted authorities regarding Bill and Don's desire to hire someone to kill Smith and Andrews. Sherpinskas testified at trial that he and Bill began discussing the contract murders in October, 1995. Bill became enraged when Bill's son, DeWitt, filed suit to gain control of Bill's business, and Bill believed Smith was behind it. Bill decided to kill his son, as well as Andrews and Smith, but then decided to merely frame DeWitt in a drug offense.

Bill arranged the murders with Sherpinskas, who was acting on FBI instructions. Bill assured Sherpinskas that Don would travel from North Carolina to pay Sherpinskas in South Carolina. If Sherpinskas could not find a hit man, Bill told Sherpinskas Don would find someone else.

George Thomas Young ("Young") testified that while he and Bill were imprisoned, they discussed plans to kill Smith and Andrews. Neither Sherpinskas nor Young knew of Bill's conversations with the other man. Young testified that Bill planned for Young to kill Smith and Andrews after Young's release from prison on December 1, 1995, in exchange for

money from Don. Bill gave Young maps to Smith's girlfriend's house and to Andrews' house. He explained that Don would help Young find the houses and would pay Young for the murders.

After Young's release, Don traveled from North Carolina to meet with Young and showed Young the two residences. Don paid Young $2,000 and provided him with calling cards to call Don. In the first week of Young's release, he frequently called Don, and Don called Young at least once. On December 7, 1995, before Don knew of the "murder" of Andrews,[1] Don met with Young to discuss the murder plots. Young's wife and a neighbor corroborated that Young met with Don and had a map to Smith's girlfriend's house. Evidence showed Young could accurately describe both houses.

On December 8, 1995, Sherpinskas pretended he had arranged Andrews' murder. Bill negotiated the pay-off for Andrews' murder and the down payment for Smith's murder and assured Sherpinskas that Don would pay Sherpinskas' hit man. Bill and Sherpinskas arranged the code work "Turbeville" for Don to use, so that the hit man could recognize Don.

Don visited Bill in prison on December 14, 1995. Shortly after, Don traveled to a rest area off Interstate 95 to pay the hit man. At the pre-arranged location, Don asked the hit man (who was actually an undercover agent) if he knew the way to Turbeville. Don and the hit man discussed the pay-off, and Don told the man to get rid of the envelopes that contained the $5,000 pay-off. The hit man asked if Don had seen the article reporting Andrews' disappearance, and Don said he had been called about it earlier that morning. The two men discussed "doing Smith," but Don said to hold off on that.

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[1]Sherpinskas showed Don a photograph that depicted Andrews' "dead body" on December 8, 1995.

Don was arrested after he paid the hit man for Andrews' murder. Upon arrest, Don stated with disgust, "The things you would do for your brother." Don testified at trial and claimed he hired Young to find stolen equipment and never knew of any murder plot. He testified he believed he was paying the hit man for Andrews' affidavit, despite his knowledge that Andrews was missing.

As noted previously, Don and Bill both appealed their conviction to the United States Court of Appeals for the Fourth Circuit raising eleven issues. The Fourth Circuit rejected all eleven grounds of error, addressing some on the merits and summarily affirming as to others. In so doing, the Fourth Circuit noted, on more than one occasion, that the evidence against the defendants was overwhelming. Among the issues raised and rejected on appeal, Don argued that this court erred in (1) denying a motion to sever the trials, (2) instructing the jury that they could not find one defendant guilty and the other defendant not guilty of the two-person conspiracy, and (3) denying a motion to consolidate Counts 1 and 2.

PETITIONER'S CONTENTIONS

In the petition presently before the court, Don alleges that his trial attorney, Jack Swerling, rendered constitutionally ineffective assistance. He contends Swerling was deficient in:

(1) Failing to move for a severance on the grounds that Bill (Don's co-defendant) would give favorable testimony in a separate trial;

(2) Failing to inform the court that he (Swerling) had previously represented Bill;

(3) Failing to object to the court's charge on inconsistent verdicts; and

(4) The cumulative effect of Swerling's errors.

Don also argues that his rights under the Double

Jeopardy Clause of the Fifth Amendment were violated when he was sentenced for two counts of conspiracy to commit murder-for-hire and that U.S.S.G. § 1B1.2(d) violates the double jeopardy provision.

The court has carefully reviewed the record in this matter, the earlier appeal, and the alleged grounds of error. Having done so, the court agrees with the government that an evidentiary hearing is not necessary and that summary judgment is appropriate as to all claims.

I.

INEFFECTIVE ASSISTANCE OF COUNSEL

(A) The Severance Issue

Don argues that Swerling was ineffective by failing to move for a severance on the ground that Bill (Don's brother and co-defendant) might provide favorable testimony in a separate trial. It should be noted that Swerling did move for a severance on numerous occasions in this case. He first made such a motion on January 24, 1996, prior to trial. Thereafter, he moved for a severance (1) when the court agreed to permit evidence of the Graham murder, Bill's fugitive status, Don's assistance, and insurance policies on Smith and Graham; (2) when this court allowed into evidence testimony regarding a racial remark in a letter by Bill; (3) when this court allowed a letter from Bill to his wife in evidence, in which Bill said he would have done the same thing for Don; (4) when the court admitted into evidence a letter by Bill regarding Smith, Graham, and Bill's son; and (5) when the court admitted Bill's threat to Young. The court denied a severance each time the motion was made and the Fourth Circuit affirmed this court's rulings.

Don now argues that if the motion to sever is based on

the need for his co-defendants' testimony, it would have been granted, and that Swerling was constitutionally ineffective for failing to do so.

When the motion to sever is based on prospective co-defendant testimony, the defendant must show: (1) a bona fide need for the co-defendant's testimony; (2) the likelihood the co-defendant would waive his Fifth Amendment privilege and testify at a second trial; (3) the substance of the co-defendant's testimony; and (4) the exculpatory nature and effect of such testimony. *United States v. Reavis*, 48 F.3d 763, 767 (4th Cir. 1995).

When it became apparent that Bill's proposed testimony was a central aspect of this motion, the court allowed, over the government's strenuous objection, the deposition of Bill to be taken. The court has received and reviewed the transcript of Bill's deposition. It appears that it is now Bill's position that he wished to testify in his brother's behalf; that he would have completely exonerated his brother as having nothing to do with the murder-for-hire scheme; and that he would have taken this position regardless of whether his case or Don's case was tried first. Rather significantly however, Bill also testified that if called to testify for his brother in a separate trial, he would have also attempted to exonerate himself. In other words, Bill was not willing to accept blame for the effort to have the witnesses killed, while at the same time stating that his brother had nothing to do with the plan. Rather, it was, and remains, Bill's position that neither he nor his brother had anything to do with the murder-for hire scheme. This position is borne out by the fact that Bill continues to litigate his own underlying conviction.

Even if Don were able to satisfy the first three prongs of the *Reavis* test, his claim must fail on the fourth element. He has failed to show that the nature and effect of such testimony would be to exculpate him. Thus, Swerling cannot be faulted

for failing to move for severance on this ground.

As the government observes in most compelling fashion in its memorandum, Swerling had an abundance of reasons not to move for a separate trial. To begin with, Bill already had a previous conviction for murder and, as noted above, if called to testify in Don's case, he would not only have attempted to exonerate Don, but would have attempted to exonerate himself as well. The evidence, both direct and circumstantial, against Bill was substantial.

According to Swerling's affidavit, he reasoned that insisting on a separate trial and calling on Bill to testify in an attempt to exonerate his brother would have been counterproductive. Rather, Swerling reasoned that it would be better to be tried together so that a contrast could be drawn between Don and Bill (who had a prior murder conviction and against whom the evidence was much more compelling). Although this strategy did not work at trial, and the jury convicted both defendants, the court cannot conclude that Swerling was constitutionally ineffective in seeking to secure a severance on the ground that Bill's testimony would have helped.

(B) The Previous Representation

Don next contends that Swerling was ineffective in failing to inform the court that he had previously represented Bill Prince. It appears from the record that Swerling represented Bill previously on a supplemental petition for re-hearing and a supplemental motion for a new trial in connection with his state court conviction. As to this representation, Bill acknowledge that "[a]t no time did we ever discuss any underlying facts of the case or any information which I would deem privileged or of a confidential nature." *See* undated affidavit of Bill Prince attached to Jack Swerling affidavit (Ex. 9 attached to government's memorandum). Bill continued "I see absolutely no reason why Mr. Swerling cannot represent my

brother . . . in the current case . . . as I perceive no conflict of interest arising from Mr. Swerling's prior representation of me." *Id.*

Even more importantly, Don was one of the individuals who paid Swerling the retainer to represent Bill with respect to the petition and motion. Don, therefore, had full knowledge that Bill had previously provided limited representation to Bill. [sic]

In this aspect of his motion, Don alleges that Swerling had a three-fold conflict of interest. He first argues that Swerling's alleged conflict of interest prevented him from calling Bill as a witness at trial. As the government observes, however, Bill made his own decision to exercise his Fifth Amendment right and to not testify at trial. This was confirmed to this court in a colloquy the court conducted during the trial.

Secondly, Don alleges that Swerling should have removed himself from the case so that he (Swerling) could act as a witness. In connection with his earlier representation of Bill, Swerling received $5,000 (as a retainer for legal fees) at a Waffle House on Two Notch Road in Columbia. Thus, the argument goes, had Swerling not been the attorney of record, he could have testified as to this method of payment, thereby providing circumstantial evidence that the payment at a rest stop on Interstate 95 for the alleged Graham murder was innocuous.

The court is not persuaded by this argument. As the government observes in its memorandum, although cash exchanged hands at both the Waffle House and the rest stop, the similarities ended there. Bill was not a fugitive or in jail at the time Swerling was paid in cash. No code words were used during the exchange with Swerling. Moreover, had Don wished to have this evidence presented, there were alternative ways of proving it, such as a stipulation by the government or testimony by Swerling's office manager.

As to his third alleged conflict, Don contends that Swerling failed to inform the court that he had previously represented Bill because he did not want to be removed from the case and thereby lose his retainer. The court agrees with the government that nothing in the record supports this conclusory and inflammatory allegation.

(C) The Jury Charge on Inconsistent Verdicts

The government charged that the brothers Bill and Don were engaged in a two-person conspiracy to procure the murder of two witnesses. During the deliberations, the jury submitted a question asking whether it would be possible to convict one of the brothers for conspiracy and to acquit the other. The court responded, over the objection of the defendants, that such was not possible, in view of the fact that the indictment charged that Bill and Don, and they alone, were the members of the alleged conspiracy. On appeal, Don charged that the court's response to the question was error, and the Fourth Circuit rejected this contention.

Don once again attempts to raise this issue, although under an ineffective assistance of counsel claim. An attempt to resurrect an issue already decided on appeal under the guise of collateral review must be rejected.

Even if the court were to consider the claim, the court agrees with the government that the claim is meritless. In *United States v. Thomas*, 900 F.2d 37 (4th Cir. 1990), the Fourth Circuit refused to disturb a verdict where the jury acquitted one co-conspirator and convicted the other in an indictment that charged a two-person conspiracy. Seizing upon this holding, Don argues that the court's response to the jury question was incorrect. The court's response was not incorrect. *Thomas* merely held that an inconsistent verdict must be allowed to stand as to the defendant who was convicted. This does mean that the court is bound to instruct the jury that inconsistent verdicts are permissible. The court discerns no error as to this

claim.

(D) The Cumulative Effect of Swerling's Errors

Citing the dissenting opinion in *Hoots v. Allsbrook*, 785 F.2d 1214, 1223 (4th Cir. 1986)(Ervin, J., dissenting), Don contends that the cumulative effect of counsel's alleged errors deprived him of effective assistance. The actual holding in *Hoots* was the opposite. Don's argument is further foreclosed by the Fourth Circuit's decision in *Fisher v. Angelone*, 163 F.3d 835, 852 (4th Cir. 1998), which rejected the application of a cumulative error approach in federal collateral proceedings.

II.

THE DOUBLE JEOPARDY CLAIMS

At trial and on appeal, Don argued that Counts 1 and 2 were actually parts of a single conspiracy to murder two people and should be consolidated. This court denied the motions and the Fourth Circuit affirmed the conviction on both counts in the face of the double jeopardy argument. Again, issues that had been decided on direct appeal may not be ligated (sic) under Section 2255.

As to the double jeopardy aspect of the sentencing procedure, the government has conceded that both Counts 1 and 2 should have been consolidated for sentencing because they presented one conspiracy to kill two victims. However, as the government observes, the resulting error was harmless. Don's guideline sentencing range was 188 to 235 months. The sentencing range thus exceeded the ten-year statutory maximum for each offense. The Sentencing Guidelines Manual, under U.S.S.G. § 5G1.2(d) directs the sentencing court to impose a consecutive sentence when the sentence for the count with the highest statutory maximum is less than the total punishment (*i.e.*, the sentence the court has chosen within the guidelines range). In light of this guideline, this court was

required to sentence Don to at least one consecutive sentence in order to reach the total punishment mandated by his guideline range. This court made clear its intention to sentence Don to 211 months of incarceration. This court could have given Don the same 211 months sentence by sentencing him to 120 months on Count 1, and 91 months consecutive as to Count 3, instead of 91 months as to Count 2. This court clearly stated its target sentence. Therefore, the fact that the court reached its target by a consecutive sentence as to Count 2 (instead of a consecutive sentence as to Count 3) is a harmless technicality.

Finally, Don appears to argue that U.S.S.G. § 1B1.2(d) violates the Double Jeopardy Clause and is, therefore, unconstitutional. This guideline provides that "conviction on a count charging a conspiracy to commit more than one offense shall be treated as if the defendant had been convicted on a separate conspiracy for each offense that the defendant conspired to commit." This section was not applied to Don's sentence, and this issue is therefore not properly before this court. Even if the issue were properly before this court, it could not succeed. *See United States v. Malpeso*, 115 F.3d 155, 167-68 (2nd Cir. 1997).

For all the foregoing reasons, the court has determined that an evidentiary hearing is not necessary and that Don Prince is entitled to no relief. Accordingly, the motion by the government for summary judgment is granted and this action is hereby dismissed with prejudice. The government has moved to strike Prince's polygraph report. The motion is granted. *See U.S. v. Hererra*, 832 F.2d 832 (4th Cir. 1987).

IT IS SO ORDERED.

/s/
Joseph F. Anderson, Jr.
United States District Judge

December 4, 2001
Columbia, South Carolina

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES of America, *Plaintiff-Appellee,* v. Don PRINCE, *Defendant-Appellant.*	)	No. 97-4329

UNITED STATES of America, *Plaintiff-Appelle,* v. Roger Dewitt PRINCE a/k/a Bill Prince, a/k/a Ike Davis, *Defendant-Appellant.*	)	No. 97-4334

Appeals from the United States District Court
for the District of South Carolina, at Columbia.
Joseph F. Anderson Jr., District Judge.
(CR-96-122)

Argued June 8, 1999.
Decided July 20, 1999.

Before MURNAGHAN, LUTTIG, and MOTZ,
Circuit Judges.

COUNSEL

ARGUED: Jack Bruce Swerling, Columbia, South Carolina, for Appellants. John Michael Barton, Assistant United States Attorney, Columbia, South Carolina, for Appellee.
ON BRIEF: Jack W. Lawson, Florence, South Carolina, for Appellant Roger Prince. J. Rene Josey, United States Attorney, Scarlett Wilson, Assistant United States Attorney, Columbia, South Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit See Local Rule 36(c).

OPINION

PER CURIAM:

A jury convicted two brothers, Don Prince and Roger Dewitt ("Bill") Prince, of conspiring in a murder-for-hire scheme directed at killing two persons expected to testify against Bill in connection with an earlier contract murder. Both brothers appeal, asserting that numerous errors require reversal of their convictions and sentences. Finding no reversible error, we affirm.

I.

I.

In 1992, a South Carolina state court tried and convicted Bill Prince, along with Charlie Dorn Smith, of conspiracy and solicitation of the murder of Bill's foster father, Billy Graham. Evidence at that trial showed that Prince and Smith hired a man to kill Graham to eliminate their $259,000 debt to him and to collect on a $500,000 life insurance policy on Graham. Frederick "Peaches" Andrews testified as to Prince and Smith's involvement in Graham's murder.

Prince and Smith appealed their convictions; Prince remained free on bond during the appeal period. The South Carolina Supreme Court reversed Smith's conviction, but affirmed Prince's. Shortly thereafter, Prince learned he had cancer. He petitioned for rehearing, but the court denied that petition on August 26, 1994. Rather than turning himself in the Monday after the petition for rehearing was denied, Bill Prince left town and remained a fugitive until his capture almost a year later.

Don Prince, Bill's brother, helped Bill evade law enforcement during the year that Bill was a fugitive. Don brought Bill, who was very ill, back to the United States from Puerto Rico, visited Bill, kept in telephone contact with Bill, ran Bill's businesses for him, arranged doctor's appointment for Bill, and found places for Bill to live. When Don's ex-girlfriend learned of Don and Bill's scheme to keep Bill out of jail, Don threatened her to keep her quiet. Don worked with Bill's lawyers on new trial motions and post conviction relief; he attempted to obtain sworn affidavits to assist in these efforts. Don testified at trial, admitting that he assisted Bill in these ways while Bill was a fugitive but explaining that he did so because he loved his brother and wanted to help him during his

sickness. Don also testified that he frequently urged Bill to turn himself in.

After state authorities arrested Bill in August, 1995, Don, who lived and worked in North Carolina, frequently visited Bill in prison to attempt to acquire affidavits in an effort to obtain a new trial for Bill. Don testified to talking to T. Cross, who told Don that he could obtain an affidavit from Peaches Andrews recanting his testimony in the Bill Graham trial. Don had an affidavit prepared and gave it to T. Cross, but Andrews never signed the affidavit. Don also testified to his attempts to obtain an affidavit from Charlie Dorn Smith, who had given an affidavit in 1991 that was helpful to Bill; Don believed that Smith would sign another more detailed affidavit. Don visited Smith and had one of the attorneys and others talk to Smith; Smith, however, did not sign the affidavit. In addition, Don obtained statements from some twenty other witnesses. Various attorneys confirmed that they worked with Don to obtain the affidavits to provide grounds to obtain a new trial for Bill.

In late summer while imprisoned, Bill told Don that he had a friend, a former fellow inmate in state prison, Scott Sherpinskas, who could get the Andrews and Smith affidavits signed. Actually, Sherpinskas was an FBI informant. After talking with Bill, Sherpinskas contacted Special Agent Rob Waizenhofer telling him that Bill and Don Prince wanted to hire someone to kill Peaches Andrews and Charlie Dorn Smith. According to Sherpinskas, he and Bill Prince began discussing the contract murders of Andrews and Smith in October 1995. Bill wanted to murder Smith because he believed that Smith had orchestrated the lawsuit that Bill's son, Dewitt, had recently filed to obtain control of his father's business. Bill presumably wanted to kill Andrews because of his testimony in

Bill's first trial and his subsequent unwillingness to recant. Bill came up with the idea of having Andrews killed, with Dewitt and Smith's murders to follow. After more thought, Bill decided not to kill Dewitt but to have him framed for possessing heroin in hopes of distracting him from pursing the lawsuit. Bill assured Sherpinskas that his brother Don would travel from North Carolina to pay Sherpinskas's hit man in South Carolina. Bill also told Sherpinskas that his brother Don was going to find someone else to commit the murders if Sherpinskas could not find someone to do it.

As proof of the Princes' murder-for-hire plot, the Government presented another witness, George Thomas Young, who was imprisoned with Bill Prince during the Fall of 1995. (Young did not know of the plot with Sherpinskas and Sherpinskas did not know of the plot with Young.) Young testified that Bill asked him to arrange to murder Andrews and Smith after Young got out of jail on December 1, 1995, in exchange for a pay-off from Don. Bill gave Young maps to Smith's girlfriend's house as well as to Andrews' house and explained that Don would help Young find the houses and would pay Young for the murders. Don acknowledged that Bill introduced him to Young as a "friend," while Young was still imprisoned, but Don disclaimed all knowledge of the two murder plots.

Upon Young's release from prison, Don, after traveling from North to South Carolina, met with Young and showed him the residences of Smith's girlfriend and of Andrews. Don paid Young approximately $2,000 and gave him telephone charge cards to use for calling Don. Don admitted giving the money and telephone cards to Young at his brother's request, explaining that his brother Bill was extremely generous and often told him to distribute or send money to inmate friends.

Using the charge cards, Young frequently contacted Don during Young's first week of release, and Don telephoned Young on at least one occasion. According to Young, he also met with Don to discuss the murder plots on December 7. Young's wife and a neighbor corroborated the fact that Young met with Don and that Young had a map of Smith's girlfriend's house. The evidence shoed that Young accurately described the homes of Peaches Andrews and Smith's girlfriend.

On December 8, 1995, Sherpinskas pretended that he had arranged to have a hit man murder Andrews and showed Bill a staged photograph depicting the dead body of Peaches Andrews. Bill negotiated with Sherpinskas as to the amount owing for Andrews's murder and the down payment for Smith's murder. Bill assured Sherpinskas that Don would make the payments to Sherpinskas's chosen hit man. Bill and Sherpinskas came up with the code work "Turbeville" for Don to use so that the hit man would know and recognize Don.

When Don arrived at the prearranged location, a rest stop area off Interstate 20, he asked the hit man (actually undercover FBI Agent Bruce Otterbacher who taped their conversation), "You don't know how to get to Turbeville, do you? Don and Otterbacher discussed the payoff and Don told him to get rid of the envelopes that contained the $5,000 payoff. Otterbacher asked Don if he had seen the newspaper story reporting the disappearance of Peaches Andrews and Don told him that he had been called earlier that morning about the article. Otterbacher talked about the "first deal" and the "second one." Don told the agent "he wants you to hold off on the second one." The agent replied, "he doesn't want me to do Smith?" Don answered, "no, he wants you to hold on it . . .he wants everything on hold" because "things are buzzing about this." There was a mix-up regarding the payments and the

agent asked Don when he could talk to his brother Bill and clear the matter up. Don demurred, explaining, "I don't like to talk a lot to him on the telephone because when he was on the run all my lines were bugged . . . and they still may be."

After Don paid the agent, law enforcement officers arrested him. The police reported that Don then stated in a disgusted voice, "The things you would do for your brother." In the weeks after Don's arrests, the Government obtained search warrants for Don's office, home, boat, and car. The Government introduced at trial several incriminating letters and documents obtained from those searches.

The brothers (mostly Don) lodge numerous arguments as to why their convictions must be reversed.

II.

Both brothers initially object to the district court's refusal to redact a tape recording and transcript of a conversation between Bill and a Government informant in order to omit Bill's use of the word, "niggers." They rightly note that this pejorative word had no probative value and was likely to be prejudicial to them.

The Government suggests that the district court offered to allow the defense to use its own version of the transcript, which lacked the epithet. But in fact, the court offered only to allow the admission of the defendant's transcript *in addition to* the transcript prepared by the Government, which did contain the epithet. As the district court observed, this approach would almost certainly have had the effect of making the epithet more conspicuous, and thus the brothers' refusal to agree to it cannot be considered a rejection of a solution to the problem.

The Government also suggests that redaction is unnecessary in this case because the epithet was isolated, redaction would have delayed the trial, and the defense had failed to seek redaction before trial even though it had access to the tape for several weeks. The primary reason the defense failed to request redaction earlier, however, appears to be that its transcript of the tape never included the word. Although at trial the Government asserted that redaction would take "all afternoon," that statement seems to have been based primarily on its concern that new transcripts would have to be made, and the district court indicated that new transcripts could be made quickly and easily. Accordingly we find the Government's argument that the epithet was properly admitted because redaction would have caused unjustifiable delay unpersuasive.

However, we believe that the error in failing to redact the statement was harmless because of the district court's careful jury instruction. "We generally presume that a jury will follow cautionary instructions regarding potentially prejudicial evidence." *United States v. Love*, 134 F.3d 595, 603 (4th Cir. 1998). The district court instructed the jury not to allow the offensive language in the tape influence its conclusions. This instruction was sufficient to eliminate the relatively modest prejudicial effect that this isolated epithet might otherwise have had on the jury.

III.

While in prison, Bill sent a letter to his wife, which contains the following passage:

> Please keep me posted on Pam [Don's daughter] and Scott's kids. I sure hope Jillian will be well soon. I know they are really hurt with everything that is going

> on. But I hope they will understand that everything is my fault. I will never be able to forgive myself for the problems that I have caused everybody. *But if it would be any consolation, I would have done the same for Don.*

(Emphasis added.) The district court concluded that this letter constituted proper admissible evidence against Bill, but not against Don. Neither of those rulings is challenged on appeal.

What Don does challenge is the district court's refusal to sever his trial from Bill's. Don contends that the emphasized sentence in this letter facially and powerfully incriminates him. For this reason, he asserts that its admission at their joint trial violates the rule established in *Bruton v. United States*, 391 U.S. 123 (1968). In *Bruton*, the Supreme Court held that admission at a defendant's trial of the confession of a non-testifying co-defendant, which is "powerfully incriminating" of the defendant, violates the defendant's Sixth Amendment right to confront adverse witnesses. *Id.* at 135. A cautionary instruciton by the trial court cannot cure such a violation and if such is to be admitted against the co-defendant, severance of the defendants' trials is necessary. *Id.*

Subsequently, in *Richardson v. Marsh*, 481 U.S. 200 (1987), however, the Court clarified that a jury instruction can prevent or cure a Sixth Amendment violation where the proffered statement does not expressly implicate the defendant, but only becomes incriminating by virtue of an inference from other evidence. The Court explained:

> Where the necessity of such linkage is involved, it is a less valid generalization that the jury will not likely obey the instruction to disregard the

> evidence. Specific testimony that "the defendant helped me commit the crime" is more vivid than inferential incrimination, and hence more difficult to thrust out of mind. Moreover, with regard to such an explicit statement the only issue is, plain and simply, whether the jury can possibly be expected to forget it in assessing the defendant's guilt; whereas with regard to inferential incrimination the judge's instruction may well be successful in dissuading the jury from entering onto the path of inference in the first place, so that there is no incrimination to forget.

Id. at 208.

The *Richardson* Court emphasized that the statement at issue there omitted all reference to the existence of the defendant; of course here, the challenged statement does expressly name Don. Moreover, the *Richardson* Court rationalized its distinction between "facially incriminating" statements and statements "requiring linkage" by noting that a rule limiting the application of *Bruton* to the former could be "complied with by redaction - a possibility suggested in that opinion itself." *Id.* at 208-09. Here, redaction of the last sentence would have entirely remedied the problem; however, neither the parties nor the district judge considered redaction. They only discussed exclusion of the entire letter, severing Don's trial from Bill's or admission of the letter with an instruction that the jury was only to consider it as evidence against Bill. (Don rejected the instruction.)

Thus the case at hand differs from *Richardson*. However, Don cannot prevail based on these distinctions because *Bruton* does not mandate severance unless evidence "powerfully incriminates" a defendant. In *Bruton*, the co-

defendant directly inculpated the petitioner by stating essentially that "we committed the crime." Here, on the other hand, the challenged passage does not powerfully incriminate Don.

To be sure, in light of the evidence presented in this case, a juror could conclude that "the same" Bill would have done for Don referred to the crime charged against Don - conspiring to murder the witnesses against his brother. Even if all evidence of Don's aid to Bill while Bill was a fugitive was excluded, *see infra* at 11-12, the Government presented abundant evidence that while Bill was imprisoned, Don visited and telephoned Bill frequently, ran his businesses, and worked feverishly to obtain the affidavits believed necessary for Bill's new trial. Indeed, Don testified at trial and freely admitted to the considerable efforts he made on his brother's behalf.

If Don was, as he claimed, not guilty of the crime charged, Bill might well have especially regretted and so particularly apologized to the family for the fact that Don's innocent assistance to him could be used as circumstantial evidence tying Don to Bill's criminal conspiracy. The statement in Bill's letter is not in any way inconsistent with Don's defense that he extensively assisted his brother but never participated in any murder-for-hire plot. The statement, standing alone, simply does not powerfully incriminate Don.

IV.

Don also challenges the search warrants used by the Government to search his car, home, boat, and office. He contends that the warrants were supported by false information, were not based on probably cause, and were overbroad.

We have carefully examined the affidavits and warrants. We have no difficulty concluding that the affidavits contained no information known by the officers to be materially false. Similarly, those affidavits provide ample probably cause to justify issuance of the warrants.

Some portions of the warrants do, however, contain broad boilerplate language authorizing seizure of every conceivable item without tying these items to the alleged crimes or circumstances of the case. However, the first two categories of "items to be seized" listed in the warrant are specifically identified, *i.e.* "life insurance policies, business transactions, and/or communications involving" Bill, Don, and their allegedly intended victims, and documents "evidencing the fraudulent or illegal acquisition of life insurance policies or the proceeds thereof." These two categories are certainly described with adequate particularity. *See United States v. Fawole*, 785 F.2d 1141, 1144 (4th Cir. 1986).

We have held that, in order to avoid the suppression of lawfully seized evidence, a warrant that properly identifies some items "will not be defeated by [other] ambiguous or conclusionary language" so long as the warrant was "sufficiently particularized with respect to the items seized." *United States v. Jacob*, 657 F.2d 49, 52 (4th Cir. 1981). In other words a court will "sever" the too general portion of the warrant from the sufficiently specific portion. *See United States v. George*, 975 F.2d 72, 79 (2d Cir. 1992). A search "conducted pursuant to a warrant held unconstitutional in part does not invalidate the entire search [and] only those items seized beyond the warrant's scope will be suppressed." *Id.* (" 'the remedy with respect to any items exceeding the scope of the warrant [is not] invalidation of the search but suppression of those items.' ")(quoting *United States v. Dunaloy*, 584 F.2d

6, 11 n.4 (2d Cir. 1978)).

Don has pointed to no evidence used by the Government at trial that did not fall into the properly identified first two categories of the warrant. The evidence obtained pursuant of the lawful portion of the warrant was rightly admitted, the remainder of the warrant, while too broad, provides no basis for reversal.

V.

Don maintains that the district court erred in admitting, over his objection, evidence of Bill's prior murder conviction; evidence that Bill was a beneficiary of the insurance policies held by the victim of that murder, Billy Graham, and by one of the intended victims of the instant murder-for hire scheme; evidence that Don helped Bill collect on Graham's policy; evidence that Don helped Bill when he was fugitive; evidence, including the complaint, of a lawsuit brought against Don by his nephew; and evidence of threats allegedly made by Don against a woman who later testified at trial for the Government. Don asserts that the admission of this evidence violated Federal Rule of Evidence 404(b), in that it simply constituted evidence of bad character with no other legitimate evidentiary purpose, and Rule 403, in that its prejudicial effect outweighed its probative value.

Rule 404(b) permits admission of evidence necessary to prove "motive, opportunity, preparation, plan, knowledge, identity or absence of mistake or accident." *United States v. Bailey*, 990 F.2d 119, 122 (4th Cir. 1993). Also admissible is evidence of bad acts that arise out of the same series of transactions as the charged offense and is "necessary to complete the story of the crime," *United States v. Kennedy*, 32

F.3d 876, 885 (4th Cir. 1994), evidence inextricably intertwined with the charged crime, *United States v. Chin*, 83 F.3d 83, 88 (4th Cir. 1996), or evidence "elicited as part of the groundwork that the government needed to lay to explain to the jury how . . . individuals fit into the operation of [a] conspiracy," *United States v. McMillon*, 14 F.3d 948, 955 (4th Cir. 1994). It is well established that evidence of these kinds does not implicate Rule 404(b)'s prohibition of evidence admitted solely to demonstrate bad character. *See Kennedy*, 32 F.3d at 886; *Chin*, 83 F.3d at 88; *McMillon*, 14 F.3d at 955.

We fail to see what bearing Bill's murder conviction and his status as a beneficiary of the insurance policies would have on the matter of Don's character, and thus we doubt that this evidence even raises a question under Rule 404(b). The evidence concerning Bill and the insurance policies certainly has no such significance in itself. Assuming that Bill's prior murder conviction could have subjected Don to inferences of guilt or bad character by association, that evidence was plainly admissible as evidence necessary to complete the story of the crime. *See Kennedy*, 32 F.3d 885. Similarly, the evidence concerning the lawsuit was properly admitted to illustrate Don's motive and intent to kill Smith. Likewise, Don's threatening statements to his ex-girlfriend was evidence of his intent, preparation, plan, and absence of any mistake. Nor did any of this evidence unfairly prejudice Don.

The evidence that Don helped Bill collect on the Graham policy and that Don helped Bill while he was a fugitive, by contrast, should have been excluded. This evidence could have been omitted without adversely affecting a complete presentation of the story of the crime alleged against Don, *i.e.* conspiracy to murder the witness. The assistance Don gave Bill when he was a fugitive manifestly was not part of the

same criminal episode as the conspiracy to murder the witnesses; the "criminal episode" surrounding Bill's flight from justice terminated when Bill was captured, and there is nothing to indicate that Bill planned to murder the witnesses before then. Thus, evidence of Don's assistance to Bill while he was a fugitive was not admissible as evidence of acts constituting "necessary preliminaries" to the conspiracy, acts "inextricably intertwined" with it, acts forming part of a single criminal episode containing the alleged crime, *Chin*, 83 F.3d at 88, or acts arising out of the same series of transactions, *Kennedy*, 32 F.3d at 885.

It is difficult to see what probative value this evidence could have had other than to suggest that Don had previously been involved in Bill's unlawful activity, and that Don was therefore likely to have conspired with his brother in the charged conspiracy. The only justifications that the Government offers for this evidence are that it "allowed the jury to fully understand the extent of the conspiracy and the illegal methods used by him and Bill in reaching the goal of the conspiracy," and that it "shows how the Prince brothers established a relationship of trust through their activities and how these events flowered into the charged crimes." Brief of Appellant at 33. The former assertion falsely implies that the prior bad acts were part of the conspiracy alleged, and the latter in effect creates a new exception to Rule 404(b) that would allow a defendant's prior bad acts in conjunction with a co-defendant, whatever their nature, to be admitted in virtually every instance.

In sum, even if this evidence could survive scrutiny under Rule 404(b), it would nonetheless be inadmissible under Rule 403 because its prejudicial effect would outweigh whatever modest probative value it might have. However, even

where the trial court abuses its discretion in admitting bad character evidence, such error may be harmless. *See United States v. Kenny*, 973 F.2d 339, 344 (4th Cir. 1992). In deciding the harmlessness of an error we must determine "whether we can say that we believe that it is 'highly probably that the error did not affect the judgment.'" *United States v. Madden*, 38 F.3d 747, 753 (4th Cir. 1994)(quoting *United States v. Nyman*, 649 F.2d 208, 212 (4th Cir. 1980)). In light of the voluminous properly admitted evidence detailed above against Don, we have no difficulty finding that the error here did not affect the judgment and was therefore harmless.

VI.

Don asserts that the district court erred by instructing the jury that "[i]t does not matter whether the interstate travel took place before or after the murder occurred or was supposed to have occurred, "because the statute criminalizes interstate travel with an intent that murder "be committed," not interstate travel following a murder.

Don maintains that the meeting in which he gave money to the Government agent occurred after the victim to whom the payment allegedly related, Peaches Andrews, was already believed to be dead. Even if the Government cannot rely on evidence of travel post-murder, a question we need not decide here. this does not assist Don in light of the fact that the Government produced evidence tending to show that Don traveled interstate to further the plan to murder Andrews *before* he came to believe Andrews was dead. The evidence indicated, for example, that Don could not have believed Andrews was dead prior to December 8, and that Don drove from North to South Carolina on December 1 to meet with an individual concerning Andrews's murder.

VII.

We have carefully reviewed Don's other arguments as to why his conviction must be reversed and find them all meritless. There remains only Don's assertion that district court improperly enhanced his sentence for obstruction of justice under U.S.S.G. § 3C1.1.

On appeal, Don essentially contends that there was insufficient evidence for the district court to find that he gave false testimony when he took the stand. The district judge made a finding at the sentencing hearing that Don had lied at trial when he testified that the money he gave it to the hit man was paid for the purpose of obtaining affidavits to help secure a new trial for Bill. The district court relied heavily on the audio tape of the meeting at the interstate rest area between Don and Agent Otterbacher. Though the court noted that "the parties [on the tape] used guarded language and code words," it also noted that "[i]t was obvious they were talking about something that was somewhat nefarious" and that there was no reference on the tape to any sort of affidavit. Indeed, the tape contains interchanges between Don and the undercover agent that seem surely related to the plot to murder Peaches Andrews and Smith, not to affidavits. For instance, when Otterbacher complained about the amount of money Don had brought, the following exchange took place:

Otterbacher: I was supposed to get five thousand for the first deal, okay. That was up front and I was supposed to get five thousand more cut in half and you guys were gonna hold on to half of it for the second one.

Don: Yeah, but [Bill] wants you to hold off on the second one.

Otterbacher: Oh he doesn't want me to do Smith?

Don: No, no, no, no, no he [Bill] wants to hold on it.

Otterbacher: I thought he wanted him done in a couple days.

Don: No, no, no, no, he wants you to hold him. He wants you to hold on him . . .

The discussion on the tape in conjunction with the trial testimony of Sherpinskas, who arranged the meeting, convince us that the district court did not commit clear error when it found that Don had lied on the stand about this meeting. Thus, there was sufficient evidence to support the district court's obstruction of justice enhancement.

In his reply brief, Don additionally contends that the sentencing judge failed to follow the requirements of *United States v. Dunnigan*, 507 U.S. 87 (1993). *Dunnigan* directs that in order to impose an enhancement for obstruction of justice, a court must make a "finding . . . of an obstruction of, or impediment to, justice that encompasses all of the factual predicates for a finding of perjury." *Id.* at 95. The "factual predicates" consist of at least the main elements of the Court's definition of perjury: falsity, materiality, and intent. *See id.* at 94. Don contends that in this case the district court found only that Don committed "perjury" and made no specific findings on two of the factual predicates, namely intent to testify falsely and materiality.

Whether the district court's finding was sufficient under *Dunnigan* presents a close question. However, this circuit has long held that we will not address new arguments raised for the first time in the reply brief. *See Hunt v. Nuth*, 57 F.3d 1327,

1338 (4th Cir. 1995). Don has thus waived his *Dunnigan* argument; the obstruction of justice enhancement was not otherwise in error.

AFFIRMED

EXCERPTS FROM TRIAL TRANSCRIPT

July 3, 1996 Pre-trial conference transcript, pp. 44-46

MR. MOORE: The only other issue I know out there, Judge, and I feel I better bring it up for housekeeping, is Mr. Swerling filed a preliminary motion for severance.
THE COURT: I was going to mention that when we got to their side.
MR. MOORE: I don't think that based on that motion he has met the standards required by the Fourth Circuit to require your honor to sever these cases. If we have to argue the specific facts and law I am prepared to do it now.
MR. SWERLING: Judge, at this point — we always make a preliminary motion for severance to advise the court in joint defendant trials the possibility exists. I can envision some rulings on the 404 evidence that might effect whether or not we might be entitled to a severance.

At this point I would tend to agree with Mr. Moore — first of all, I am not sure we are asking for severance at this point. We made a preliminary motion. Two, I am not sure we would have the legal justification under Fourth Circuit law. I would stand on my position and keep the court alerted.
THE COURT: A motion for severance is a continuing motion because events can come up that cause it to have merit later on. We will defer on it right now.
MR. SWERLING: I filed the motion because I don't want it considered I waived it.
THE COURT: I understand. Anything else from the defendant's perspective we can do today?
MR. SWERLING: No sir.

July 13, 1996 Trial Side Bar Transcript p. 60.

THE COURT: Let me excuse the jury. I think we may even need to go ahead, get the proffer now.
MR. SWERLING: It's going to take awhile, but that's fine. But I would also do this, judge, I would move for severance. Because Mr. Bill Prince will testify favorably for his brother. And I cannot call him as a witness in this case. And I can call him in a separate proceeding, and he will not assert the fifth amendment in a separate proceeding. So I can represent we can take a proffer from Mr. Bill Prince too. But I think I'm entitled to severance, if the government wants to tie my hands.
THE COURT: Let's excuse the jury.

July 15, 1996 Trial Transcript, pp. 215 through 218.

THE COURT: Well, I'm going to give them an answer to the question, give them a watered down instruction on conspiracy, that makes it clear that the conspiracy is an agreement which requires two people. All right. Please bring in the jury.
(Jury In.)
Let me first ask who from amongst you has been selected as the foreperson?
THE FOREPERSON: I have.
THE COURT: What is your name?
FOREPERSON: Jill Tucker.
THE COURT: Tucker? I'm sorry. Miss Tucker and members of the jury: we received in relation to counts one and two, regarding the alleged conspiracy, can we render a verdict for one defendant and/or a not guilty verdict for the other defendant?

In response to that, I would say the answer to that question is no. The reason for that answer is as follows:

You will recall I told you in my jury instructions, a conspiracy is a kind of criminal partnership a combination or a agreement of two or more persons to join together to accomplish some unlawful purpose.

I also told you that of the four elements necessary for the government to prove beyond a reasonable doubt to establish a conspiracy, the first of those elements is that the two defendants entered into the unlawful agreement charged in the indictment between on or about October first, 1995, and December 14, 1995.

Thus, because of the essence of an agreement is a situation involves two people, [sic] the answer to the question you have asked me is no.

I would ask that you now return to your jury room and resume your deliberations.

(Jury out.)

THE COURT: All right. Objection from either side what I just told the jury?

MS. WILSON: None from the Government, your Honor.

MR. SWERLING: Judge, what I -- I have a problem with now, the jury doesn't have -- they have the answer, but they don't have any guidance about it. Because if they need to be instructed that the government has only alleged Don and Bill Prince to be the co-conspirators in this case. If they find that one of them did not enter into a conspiracy, then there is no conspiracy.

But the way it was explained to them, I'm not sure they understand why. And therefore they would have difficulty --

THE COURT: Well, you want me to bring the jury back as to counts one and two, they are both guilty or both not guilty?

MR. SWERLING: Of conspiracy.

THE COURT: Of conspiracy, count one and two.

MR. SWERLING: Because the government has alleged that they were the two conspirators. If they had -- I also like your

honor to tell them somehow that they are not convinced beyond a reasonable doubt that one is a member of the conspiracy, then --

THE COURT: I think that's implicit in the whole charge in what I told them.

MR. SWERLING: Well, that's what I was worried about when your honor was charging them just now, isolating that portion of it. But they don't understand, at this point, I can't imagine that they would understand why both would have that -- I don't understand, I don't think they understand why they can't find them guilty, one guilty of conspiracy the reason is because there's only two people.

THE COURT: Yeah, well, I didn't tell them what I said earlier, you can't conspiracy with yourself. But I think it's implicit in what I said, it takes two people -- two or more people. In this case, the only two people have been alleged are the two defendants.

Let me say in regard to your suggestion that we just not straighten them out, tell them that, I'll fix the verdict if it comes in inconsistent. I don't think that's appropriate way to look at it. If we, you know, for example, pick a different example in a different context, a lot of times juries come back ask me about punitive damages and want more guidance. I wouldn't tell them you just do whatever you think is right, and if it is too much, I'll fix it later. I mean, that's just not the way we instruct juries.

MR. SWERLING: I wouldn't instruct the jury you would do that. I think it is a matter of law for the Court, the jury shouldn't have any part of that.

THE COURT: Well, I'm going to stand on what I told the jury. I think it adequately responded to their question.

TRIAL ATTORNEY AFFIDAVIT EXCERPTS:

"Don Prince and I opted to not ask for a severance for the following reasons." July 12, 2001 Affidavit of Jack B. Swerling. p. 4

"Neither this attorney, nor any attorney who regularly practices in the courts, would have taken a worthless statement from Bill Prince or put him on the stand to give a totally unbelievable story to the jury about his own role." July 12, 2001 Affidavit of Jack B. Swerling. p. 6

"The petitioner asserts that I only moved for a severance after being prompted to do so by the Court and that I "babbled" my reasons. This is a blatant disregard for the record. I have already discussed why a severance was not requested on the "exculpatory " testimony of Bill Prince. A severance was asked as for on the following occasions . . . (citing Transcript of July 5, 1996 hearing, p. 46; Transcript of July 9, 1996, p. 147; Transcript of Side Bar Conferences, p. 8; Transcript of July 12, 1996, p. 823; Transcript of Side Bars, July 7, 1996 pp. 20-21). July 12, 2001 Affidavit of Jack B. Swerling p. 8.

"The Petitioner argues that he was procedurally barred from claiming error regarding this issue. He also alleges we did not argue plain error. Plain error was argued in the Petitioner's Reply Brief in response to the government's brief. This is not correct. While the Government may have argued it, the Fourth Circuit did not say the issue was not preserved for appellate review - they said that argument, as well as several other arguments, were without merit. "We have carefully reviewed Don's other arguments . . . and find them all meritless." U.S.

v. Prince, 187 F.3d 632 (CA 4 1999), unpublished . . .Petitioner asserts that I never raised this issue in oral argument. While I do not recall whether I did or not, we have a limited time in which to present oral arguments, and I argued what I thought had the most merit." July 12, 2001 Affidavit of Jack B. Swerling, p. 16.

"The petitioner has misrepresented many facts to the Court and with regard to several matters he is at best simply not telling the truth, e.g., I refused to call his brother as a witness. The Petitioner knew and still knows that calling Bill Prince would have been a disaster because all Bill Prince wanted to do is tell how everyone, including the government and his son, were against him and the *mea culpa* he had promised was never to be offered. The petitioner and I agreed on not to sever the case or call Bill Prince." July 12, 2001 Affidavit of Jack B. Swerling, p. 17.

"It is my opinion that had Bill Prince taken the stand and testified that he was responsible for the acts that took place and that Don Prince was unaware of his conduct and the nature of the activities which Bill Prince had become involved in then his testimony would have benefitted Don Prince. I am also of the opinion that had Bill Prince so testified on behalf of Don Prince given the probable substance of that testimony, the testimony would have had an impact on the jury in its deliberation as it relates to Don Prince." June 20, 2001 Affidavit of Jack W. Lawson, Jr., ¶ 8.

STATUTORY PROVISIONS

28 U.S.C. § 2255

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion

pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of--

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain--

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense;

or
(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

18 U.S.C.§ 371.

Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.
If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.